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The legal framework and commercial strategies for collective management in preparation to the UK's withdrawal from the EU

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Abstract: In its Notice to stakeholders: withdrawal of the United Kingdom and EU rules in the field of copyright of March 2018, the European Commission indicated that one of the effects of the UK's withdrawal from the EU is likely to be a reduced degree of reciprocity in the way collective management organisations operate. This article analyses reactions and current collaborative efforts produced by industry stakeholders facing an uncertain legal framework in the field of collective management of music copyright.

ARTICLE

The picture forming on the horizon for intellectual property laws after the UK's withdrawal from the European Union is becoming a composite one as negotiations progress and deadlines approach. In many industries, a lack of clarity and consistency continues to affect stakeholders' strategies and decisions. The music industry is looking anxiously at the developments due to emerge if specific agreements are reached in the field of copyright. Within this field, collective management is a leading strategic aspect.

In evaluating the possible effect of new rules on collective management of copyright on industry stakeholders, it seems appropriate to embrace the view that copyright harmonisation within the EU, achieved by way of Directives and judicial interpretation, has been extensive despite the absence of an "overarching unitary regulatory system for EU copyright".¹ Against this background, on 28 March 2018 the European Commission

¹ Luke McDonagh, "UK Patent Law and Copyright Law after Brexit - Potential Consequences" (Centre for International Governance Innovation, 2017) *Brexit: The International Legal Implications, Paper No. 3* — November 2017, p.8.

published a key document entitled *Notice to stakeholders: withdrawal of the United Kingdom and EU rules in the field of copyright*, in which it details some specific consequences of the UK's withdrawal from the European Union for copyright and related rights. The Notice refers to the copyright framework established under international treaties but also indicates that the *acquis* which developed as a consequence of EU law goes beyond the standards and obligations of those treaties. In fact, it has now formed a special body of law ('*lex specialis*').² The unique character of the copyright *acquis* transpires not only from measures set to harmonise substantive principles of copyright law, but is clearly present in the aims and objectives driving the harmonisation of rules on collective management, which extend to standards and procedures for the exploitation of copyright and related rights.³

The reform introduced with the Collective Rights Management Directive (2014/26/EU) is the result of decades of effort spent facilitating the smooth functioning of the internal market⁴, and particularly in eliminating the problematic fragmentation encountered in the online market for music services.⁵ Notably, it can be said that UK stakeholders have been committed and thoroughly involved in the process of adoption of the Directive.⁶ With the UK's withdrawal from the EU, will the effects of such efforts dissipate? As expected, the Commission clearly indicates that as things stand one of the consequences of the withdrawal is that the obligations contained in Article 30 of the Collective Management Directive (2014/26/EU) would cease to apply.⁷

² This special character is highlighted by several authors commenting on the possible scenarios that could emerge following the UK's withdrawal from the EU, including Andreas Rahmatian, "Brief speculations about changes to IP law in the UK after Brexit" (2017) *Journal of Intellectual Property Law & Practice* 12(6), pp. 510–515, and Luke McDonagh, "UK Patent Law and Copyright Law after Brexit - Potential Consequences" (Centre for International Governance Innovation, 2017) *Brexit: The International Legal Implications, Paper No. 3* — November 2017, pp. 8-10.

³ See Recitals 5 and 7 of the Directive 2014/26 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72.

⁴ For an historical reference to the European Commission's objectives, see European Commission, *Commission work programme for 2005: Communication from the President in agreement with Vice-President Wallström* COM(2005) 15 (26 January 2005), p. 16.

⁵ Recital 38, Directive 2014/26 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72.

⁶ PRS for Music, "Position Paper on the Proposal for a Directive on Collective Management of Copyright and Related Rights and Multi- Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market" (March 2013) <https://www.prsformusic.com/-/media/files/prs-for-music/corporate/crm-directive-prs-for-music-mar-2013-english.pdf> [accessed 27 April 2018].

⁷ European Commission, *Notice to stakeholders: withdrawal of the United Kingdom and EU rules in the field of copyright* (28 March 2018), p. 3.

Article 30 is of particular significance if one considers the origins, justification and functioning mechanisms of collective management organisations (CMOs) in the music industry as well as in other industries, and particularly the argument that such organisations should serve the public interest.⁸ Article 30(1) ensures that elements of solidarity and mutuality are preserved in the evolution of collective management practices in the online environment. The provision reads as follows: “Member States shall ensure that where a collective management organisation which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire requests another collective management organisation to enter into a representation agreement to represent those rights, the requested collective management organisation is required to agree to such a request if it is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works in the repertoire of one or more other collective management organisations”.⁹ The rationale of this provision is that all relevant rights holders, including those attached to small or less-known repertoires, should be able to access the internal market for online music services on equal terms.¹⁰ This would contribute to the wider goal of enhancing cultural diversity through a more efficient system of copyright transactions.¹¹

What conduct is to be expected from CMOs currently bound by the Directive, when the obligation on EU collective management organisations to represent analogous counterparts based in the United Kingdom for online multi- territorial licensing (and vice versa) is lifted? Any views that may feed into an answer to this question reinforce the points made above that effects of UK’s withdrawal are not confined to the boundaries of copyright and related

⁸ This topic is discussed in detail in Gillian Davies, “The Public Interest in Collective Administration of Rights” (1989) *Copyright*, pp. 81-89.

⁹ Article 30 of the Collective Rights Management Directive (2014/26/EU) is transposed in Regulation 29 of The Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016/221).

¹⁰ Recital 46, Directive 2014/26 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72.

¹¹ Recital 44, Directive 2014/26 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72.

rights as such, but extend to their exercise as influenced by regulation, industry practices and ongoing negotiation endeavours.¹²

Concerns, expectations and perspectives from the music industry

Prior to the publication of the 2018 Notice to Stakeholders, collecting societies and their national, regional and international representatives repeatedly voiced concerns over the risks and uncertainties that Brexit is likely to bring about in the field of music licensing. In summary, it could be argued that the industry accepted with regret the UK's decision to withdraw from the EU. At the 2017 PRS For Music AGM Robert Ashcroft said: "We must limit, wherever possible, barriers to licensing and the free flow of royalties and defend against cultural and trade protectionism".¹³ UK Music, which collectively represents the interests of record labels and music publishers, songwriters, composers, lyricists, musicians, managers, producers, promoters, venues and CMOs, included a section on Brexit in its "Measuring Music 2017 report", with results of empirical investigation on industry stakeholders' attitudes towards the UK's withdrawal, and firmly indicated that it will campaign to maintain the level of protection for copyright attained under EU laws.¹⁴ GESAC, the European Grouping of Societies of Authors and Composers, described the outcome of the UK referendum as a "blow for [the organisation] and its values".¹⁵

After all the efforts made to implement a system of pan-European licences it is feared that, given the uncertain prospect for the rules and obligations contained in the Collective Rights Management Directive (2014/26/EU), the developments brought about by Brexit could involve worrisome steps backwards from the achievement of true and effective multi-territorial solutions, unless agreements can be reached at this very critical juncture. In this

¹² In this regard, it is noted that the European Commission's *Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (TF50 (2018) 35 – Commission to EU27) (19 March 2018) does not make specific reference to copyright. This document is a draft of the Withdrawal Agreement text, and a starting point for negotiations.

¹³ His speech is available at <http://www.musicweek.com/publishing/read/brexit-the-general-election-and-record-breaking-2016-dominate-prs-agm/068586> [accessed 27 April 2018].

¹⁴ UK Music, "Measuring Music 2017 report"

https://www.ukmusic.org/assets/general/Measuring_Music_2017_Final.pdf [accessed 27 April 2018], p. 16.

¹⁵ <http://authorsocieties.eu/mediaroom/256/33/UK-referendum-outcome-is-a-blow-for-GESAC-and-its-values> (24 June 2016) [accessed 27 April 2018].

respect, it is helpful to ascertain the degree of effort produced by CMOs in securing bilateral arrangements, consolidating standard practices and affirming agreed principles under the aegis of umbrella organisations such as GESAC, CISAC and other similar bodies. A 2017 paper prepared for the British Copyright Council put the emphasis on a fundamental characteristic in the development of collective management practices, namely that the cross-border licensing solutions are often the result of combined efforts deployed by industry stakeholders and at the policy-making level. With reference to the Regulations adopted in the UK to implement the Collective Rights Management Directive (2014/26/EU), the authors acknowledge that they “are stand-alone and could be varied by the UK government however they underpin an important voluntary system in which the UK CMOs set the standard”.¹⁶ Nevertheless, the paper also highlights that most of the uncertainties will concern multi-territorial licensing post-Brexit, and that a reciprocity gap is likely to materialise in the field of copyright and influence licensing practices between UK-based stakeholders and their counterparts in EU Member States.¹⁷

One might recall that the adoption of the Collective Rights Management Directive (2014/26/EU) was prompted by the finding that voluntary implementation by Member States of the Commission Recommendation 2005/737/EC on the collective cross-border management had been unsatisfactory.¹⁸ Conversely, progress made since the Commission’s proposal for a Directive is significant and has transformed the way CMOs conduct their business. Therefore, due to the reform that has already affected CMOs, it could be argued that there is no way back for the administration of music rights in the online world. Given the concerns and expectations expressed by stakeholders in different fora and the limited

¹⁶ British Copyright Council, “Impact of Brexit on UK copyright law” (2017) http://www.britishcopyright.org/files/8514/9148/0121/Impact_of_Brexit_on_UK_copyright_law.pdf [accessed 27 April 2018], para.VII.

¹⁷ British Copyright Council, “Impact of Brexit on UK copyright law” (2017), para.VIII. Industry stakeholders have already stressed the need to consider collective management solutions as part of trade deals that the UK plans to conclude with its EU counterparts. For example, the Creative Industries Federation points out that a trade deal should ensure “reciprocity of regulation on licensing and collective rights management... [to] allow UK performing rights societies... to continue to work as effectively as possible” (“Global Trade Report” (January 2018) https://www.creativeindustriesfederation.com/sites/default/files/2018-01/Federation%20Global%20Trade%20Report_0.pdf [accessed 27 April 2018], p.5.

¹⁸ European Commission, *Explanatory Memorandum to the Proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market* (COM(2012) 372 final) (11 July 2012), para.1.3.

level of detail on the development of a legal framework for collective management, it is fair to imagine that existing CMOs will try to make the most of the time left in order to finalise agreements on the basis of current knowledge and regulatory boundaries.

Investment and collaboration in copyright integrated services and technology

Reciprocity may be achieved through the development of collaborations that are currently shaping the definition and structure of the markets for music licensing. In the CISAC decision, the Commission provided details of the structure of the relevant markets with reference to CMO's institutional tasks of granting permissions, monitoring uses, collecting royalties and distributing revenues back to rights holders.¹⁹ The Commission also indicated that the product markets affected were those for: (a) the provision of administration services to rights holders; (b) the provision of administration services to other CMOs; and, (c) the licensing of public performance rights to commercial users across different platforms and through different technologies including internet transmission.²⁰ The Commission added that the relevant geographic market is potentially worldwide in scope.²¹ Since the CISAC decision, collective management has developed in a direction that requires a further layer of market analysis, particularly in light of the efforts and investment produced by CMOs in the process of consolidating and rationalising front, middle and back-office functions. The example below clarifies the segmentation of tasks in which CMOs are involved, and the definition of product markets emanating from emerging types of collaboration.

ICE

ICE is a joint venture for the provision of front, middle and back-office services to a varied array of potential customers.²² Front office services focus on licensing negotiations, customer account and relationship management, monitoring of uses and judicial

¹⁹ *CISAC Agreement, Re* (COMP/C2/38.698) [2009] 4 C.M.L.R. 12, para.5.1.

²⁰ *CISAC Agreement, Re* (COMP/C2/38.698) [2009] 4 C.M.L.R. 12, para.5.2.

²¹ *CISAC Agreement, Re* (COMP/C2/38.698) [2009] 4 C.M.L.R. 12, para.5.3.

²² ICE stands for International Copyright Enterprise (<https://www.iceservices.com> [accessed 27 April 2018]).

enforcement of the copyright on behalf of customers. Middle office services involve invoicing of licensees, dispute analysis and resolution, collection of royalties and the preparation of business intelligence reports and market data analyses. Back-office tasks within ICE are integrated service solutions consisting of Copyright Services and Processing Services.²³ The identification of these segments is illustrative of new directions in the definition of market strategies, and technological advancement in the automation of management tasks illustrate how partnerships are investing to facilitate the implementation of mechanisms for multi-territorial licensing and the lowering of transaction costs.²⁴

ICE has already been subject to a clearance process before the Commission.²⁵ With its activities having the potential to serve EU and non-EU customers, ICE could be seen as a concrete result of the incentives generated by the Collective Rights Management Directive (2014/26/EU) and the enforcement of EU competition rules and procedures. Moreover, looking at the partners to the joint ventures, it is expected that two of them (STIM and GEMA) will continue running their operations from within the EU.²⁶ In summary, the joint venture is a manifestation of the efforts that stakeholders are willing to produce in order to consolidate their relationship in the face of legal uncertainties linked with the UK's withdrawal.

Blockchain and collective management

²³ *Case M.6800-PRSfM/ STIM/ GEMA/ JV*, Commission Decision of 16 June 2015, Annex I (M.6800 – PRSfM / GEMA / STIM – JV Commitments To The European Commission), pp.2-4.

²⁴ It is noted, however, that not all projects aimed at streamlining music rights management lead to positive outcomes. The Global Repertoire Database initiative, which folded in 2014, is an epitome of the difficulties that could be encountered in the process of aligning the interests of a varied array of stakeholders across the industry. For a comment on the relevant economic implications, see Ruth Towse, "The Economic Effects of Digitization on the Administration of Musical Copyrights" (2013) *Review of Economic Research on Copyright Issues* 10(2), pp. 55-67.

²⁵ In June 2015, The Commission declared the joint venture to be compatible with the internal market following the commitments offered by the parties (*Case M.6800-PRSfM/ STIM/ GEMA/ JV*, Commission Decision of 16 June 2015 (M.6800 – PRSfM / GEMA / STIM/JV).

²⁶ "The German roots of ICE Operations are emphasised in a report by the Managing Director of ICE Operations (Virtuos, January 2017) https://www.gema.de/fileadmin/user_upload/gema_virtuos_01_2017_happy_birthday_ice.pdf [accessed 27 April 2018].

The main attractiveness of blockchain technology for collective administration of copyright is that it is built with the purpose and capabilities of embedding verified ownership information, and tracking any change of ownership. Whether such information concerns physical or digital property is not relevant to the way the technology is conceived.²⁷ If we consider each piece of music as an asset, it can be said that “[t]he block chain constitutes a complete transaction history of all transfers of the asset (and, indeed, all other assets recorded in the chain), going back to the creation or original allocation of the asset... All transactions must be registered with the chain and included in a block to transfer the interest... Anyone can download the public ledger and thus see which keys hold which assets.”²⁸ Interestingly, the architecture of blockchain technology requires that ownership records are not held by a single entity but their validity is based on a ‘consensus model’²⁹ where the integrity of the information contained is secured by communication protocols whereby participants share any information attached to the relevant assets at all times, and any updates on ownership and transactions are refreshed at regular intervals.³⁰

Several developers of blockchain technologies are pitching their ideas and solutions to industry stakeholders, including CMOs.³¹ For example, Benji Rogers has emphasised tirelessly the benefits that can be obtained by CMOs if they lead a process of increasing data quality within the industry, and has been zealous in explaining how the blockchain technology he proposes could embed the legal elements of ‘permission’ which is necessary to use copyright protected content, and ‘obligation’ to pay and to report usage via smart contracts.³² An alternative argument, however, is that blockchain technology may threaten

²⁷ Andres Guadamuz and Chris Marsden, “Blockchains and Bitcoin: regulatory responses to cryptocurrencies” (2015) *First Monday* 20 (12) <http://firstmonday.org/article/view/6198/5163> [accessed 27 April 2018].

²⁸ Joshua A.T. Fairfield, “Bitproperty” (2015) *Southern California Law Review* 88, p.821.

²⁹ Joshua A.T. Fairfield, “Bitproperty” (2015) *Southern California Law Review* 88, p.814.

³⁰ Blockchain technology is often associated with the term ‘trustless technology’. Fairfield explains that “The term “trustless” is used here to encompass a band of extremely low-trust applications based on a distributed public ledger that is secured by an effective proof system to ensure the integrity of the ledger despite its decentralization. Note that “trustless” does not imply a lack of trust in the system. To the contrary: it implies that the system is sufficiently trustworthy that no one actor within the system needs to be trusted for the system to work.” (Joshua A.T. Fairfield, “Bitproperty” (2015) *Southern California Law Review* 88, fn 30, p.813).

³¹ Digital Service providers are also acquiring blockchain data solutions, such as in the case of Spotify and Mediachain Labs (<https://press.spotify.com/es/2017/04/26/spotify-acquires-mediachain-labs/> [accessed 27 April 2018]).

³² GEMA Blockchain Panel, 2016 Reeperbahn Festival (https://www.gema.de/fileadmin/user_upload/Videos/GEMA_Blockchain_Panel.mp4 [accessed 27 April 2018]). See also “How the Blockchain and VR Can Change the Music Industry” (November 2016)

the existence of historic intermediaries in the music business, arguably putting “artists back in a position of greater control over the monetizing of their music”.³³ Overall, could Blockchain technology produce the effect that intermediaries such as CMOs become irrelevant as licensing hubs handing proprietary information for copyright works? It has been suggested that blockchain could be a technological tool that prompts cooperation among stakeholders and brings about “a shift from an industrial information model to a truly networked industry”.³⁴ This shift is happening right now: by way of an example, PRS for Music, SACEM and ASCAP have begun a partnership with IBM to bring into the blockchain environment two standards already used within the industry, namely ISRC and ISWC.³⁵ Therefore, while perceiving a sense of inevitability in relation to the shift to be experienced by the industry’s intermediaries, it can be argued there is a commercial attractiveness to the availability of ownership data that is clear and transparent.

Conclusions

The reflection contained in this piece sought to address possible reactions to the European Commission’s *Notice to stakeholders: withdrawal of the United Kingdom and EU rules in the field of copyright* by stakeholders within the music industry, with a particular focus on matters related to collective management of rights. The analysis proposed in the article focuses on the strategic measures that stakeholders are taking in order to put in place commercially and technologically viable solutions, with the view of reducing the margins of risk determined by the uncertainty of the legal framework. In assessing these developments, it is crucial to be realistic and acknowledge the impact that legal uncertainty produces on the industry. If for example it provides incentives to fill gaps with commercial solutions agreed by way of bilateral or multi-lateral agreements between CMOs, it also creates a further level of transaction costs which could slow down innovation processes,

(<https://medium.com/cuepoint/bc-a-fair-trade-music-format-virtual-reality-the-blockchain-76fc47699733> [accessed 27 April 2018]).

³³ Aisling Quinn, “Are online music platforms undermining the principles of copyright law?” (2018) *Journal of Intellectual Property Law & Practice* 13(1), pp.49–60.

³⁴ Marcus O'Dair and Zuleika Beaven, “The networked record industry: How blockchain technology could transform the record industry” (2017) *Strategic Change* 26(5), p.476.

³⁵ This is based on the Linux Foundation’s Hyperledger Fabric (<https://www.hyperledger.org/projects/fabric> [accessed 27 April 2018]).

disperse resources and pose obstacles to keeping the pace with evolving technologies. Nevertheless, there is a reason to be positive as it is apparent that music stakeholders are not being idle but are pursuing collaborations to develop effective market solutions sought to keep in existence virtuous forms of reciprocity, which could find valuable applications in new market segments within the industry.

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